IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO.478 OF 2005
IN
NOTICE OF MOTION NO.503 OF 2004
IN
SUIT NO.1924 OF 1988

Shantilal Gulabchand Mutha,
having his address at 1184/4,
Shivaji Nagar, Ferqusson
College Road, Pune 411 005,
Maharashtra. .. Appellant
(Orig.Deft.No.2.)

v/s.

1. Tata Engineering & Locomotive
Co.Ltd., a company incorporated
under the Indian Companies Act,
1913, and having its registered
office at Bombay House, Homi
Modi Street, Fort, Mumbai-400023.

2. The Deccan Co-operative Urban
Bank Ltd., having its office at
1039, Ravivar Peth, Pune 411 002
Maharashtra. .. Respondents
(Orig.Plff and
Deft.No.1)

Mr.R.D.Soni i/by M/s.Ram & Co. for the appellant.

Mr.M.C.Palan with Mr.N.H.Nathani for the respondents.

CORAM : R.M. LODHA AND
J.P. DEVADHAR, JJ.

DATED : 22nd June, 2005

ORAL JUDGMENT (Per R.M.Lodha, J.)

We heard the learned counsel for the parties.

2. The appellant is the original defendant No.2.

He suffered the decree for want of filing the written statement. He took out notice of motion for setting aside the decree dated 12.11.2003. The said notice of motion was dismissed as not maintainable.

Hence the present appeal.

3. The learned counsel for the appellant relied upon the judgment of the Supreme Court in the case of Prakash Chander Manchanda and another v. Smt. Janki Manchanda, AIR 1987 SC 42 and the judgment of the learned Single Judge of this court in the case of Chandrakant Babulal Panchal and another v. Ashwinibhai Mancharam Patel and anr., 2003(1) Mh.L.J. and submitted that on November 12, 2003 when the suit appeared before the learned trial Judge, the defendant was absent and since no evidence has been examined upto that date for and on behalf of the defendant, the court had no option but to proceed under Order XVII Rule 2 in any one of the modes prescribed under Order IX of the Code of Civil Procedure. The learned counsel for the appellant submitted that the judgment and decree dated November 12, 2003 must be construed to have been passed in exercise of the power under Order XVII Rule 2 of the Civil Procedure Code as exparte decree and for setting aside that decree, the notice of motion was maintainable.

4. We reflected over the submission of the learned counsel.

5. On November 12, 2003, the matter was posted before the learned trial Judge for proceeding against the defendants for want of written statement. The learned trial Judge observed that the suit was of the year 1988 and no written statement has been filed until date and, therefore, decree is passed in favour of the plaintiffs and against the defendants under Order VIII Rule 10 of the Code of Civil Procedure. The defendants were absent as well on that day.

6. Order VIII Rule 10 of the Code of Civil Procedure provides that where the written statement has not been filed by the party who ought to have filed the written statement, the court shall pronounce the judgment against him or make such order in relation to the suit as it thinks fit.

7. On the date the suit was posted before the learned trial Judge, he found that written statement has not been filed and accordingly, he pronounced the judgment. The question is whether the application for setting aside the decree passed

under Order VIII Rule 10 in the facts and circumstances of the case was maintainable?

8. In Dhanwantrai R. Joshi and ors. v. Satish J. Dave and others, 1999(1) Bombay Cases Reporter, 97, the Division Bench held that in a case where written statement was not filed and at the time of hearing even if the defendant was present, the court was entitled to pronounce the judgment and pass the decree. It was also held that if the defendant was absent and the written statement as required was not filed, the court was entitled to pronounce the judgment on the basis of the averments made in the plaint and in that situation, the application for setting aside the decree would not be maintainable because such decree is passed under rule 5 or 10 of Order VIII. The Division Bench considered the relevant provisions contained in Order IX Rule 6, 7 and 13 and also Order VIII Rule 5 and 10 of the Code of Civil Procedure. It was held in paragraphs 8,9,10,11,12,13,14 and 15 of the judgment thus-

> "8. From the aforesaid judgment, it is clear that the word 'ex parte' has a specific connotation and for that procedure is prescribed under Order IX, Rule 6. Under Rule 6, if the defendant fails to appear when the suit is called out for hearing and if it is proved that the summons was duly served, then Court can make an order that the suit be heard ex parte and record the evidence and pass a decree. Order IX nowhere provides that

on the basis of the averments made in the plaint, Court can pass a decree. Court has to proceed with a suit in absence of the defendant and try the suit and pass appropriate decree. Further the order of ex parte hearing also could be set aside under Rule 7, if good cause is shown for non-appearance. Similarly, under Rule 8, when defendant appears and plaintiff fails to appear, the Court may dismiss the suit, unless the defendant admits the claim or part thereof, and in that case the Court is required to pass a decree against the defendant upon such admission. Similar are the provisions under Rule 10 and Rule 11, in case on non-attendance of one or more of several plaintiffs or defendants respectively. Rule 12 provides for consequence of non-attendance by the plaintiff or the defendant, who has been ordered to appear in person. In this context, if Rule 13 of Order IX is considered, it would be clear that the phrase "in any case in which decree is passed ex parte against defendant" would mean and apply in those cases where the Court has proceeded and passed an order under Rule 6 and has passed a decree after recording evidence. That means a decree is passed after hearing the plaintiff in absence of the defendant. With regard to dismissal of the suit or passing of decree on admission, as provided under Rule 8, there are specific provisions for setting aside such decree in Rule 9, which provides that if sufficient cause for non-appearance when the suit was called out for hearing is shown, the Court is empowered to make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and thereafter the Court is required to proceed with the suit.

9. As against this, Order VIII provides that if defendant is served with the summons, then he is required to file a written statement and if the defendant fails to file a written statement, discretion is given to the Court to pass a decree on the basis of the averments made in the plaint. For this purpose, Rule 5 of Order VIII is clear. Order VIII, Rule

5(2) provides that if the defendant has not filed pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint. However, passing of such decree depends upon the discretion of the Court and Court may insist the plaintiff to prove certain facts.

10. Considering the aforesaid provisions, in our view, the word "ex parte" as mentioned in Order IX, Rule 13 has a definite connotation to mean a decree which has been passed after following Order IX, Rule 6. After amendment in 1977 in Rule 6, it has been specifically mentioned that Court can make an order that "suit be heard ex parte". As stated above, that order can be set aside under Rule 7 and defendant can be given an opportunity of hearing in answer to the suit, as if he has appeared on the day fixed for his appearance.

11. Further, even if the order directing the suit to be heard ex parte is not set aside, the defendant is not debarred from taking part in further proceedings, if he appears on the adjourned date. While considering the provisions of Order IX, Rules 6 & 13, in the case of (Arjun Singh v. Mohindra Kumar and others), reported in A.I.R. 1964 S.C. 993, the Court has held that everything which is likely to happen in the trial Court vis-a-vis non appearance of the defendant at the time of hearing of the suit has been provided for in Order IX, Rule 7 and Order IX, Rule 13. Order IX, Rule 7 and Order IX, Rule 13 exhaust the whole gamut of situation that may arise during the course of trial. The Court has held that in a case where the stage of first hearing is passed and hearing is fixed for disposal of the suit and on the date of hearing for disposal of the suit, if defendant is not present on such date, the effect of proceedings is exparte. The evidence of the plaintiff might be taken and the judgment might be pronounced. In that case Order IX, Rule 13 would come in. The defendant is also entitled to file an appeal against the judgment and decree. Second eventuality

which may happen is the entirety of the evidence of the plaintiff could not be concluded on the hearing day on which the defendant is absent and something might remain so far as the trial of the suit is concerned for which purpose there might be a hearing on an adjourned date. Under Order IX, Rule 7, if the defendant appears on such adjourned date and satisfies the Court by showing good cause for his non appearance on the previous day or days he might have the earlier proceedings recalled "set the clock back" and have the suit heard in his presence. On the other hand, if he fails in showing good cause, then also he is not penalized in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial. Only thing is, he cannot claim to be relegated to the position that he occupied at the commencement of the trial.

12. In our view, considering the scheme of Order VIII, Rule 5 or Rule 10, as well as Order IX, it is apparent that both operate in different fields Order VIII, Rule 5, specifically provides that if defendant fails to file Written Statement as contemplated therein, the Court may pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, or the Court may in its discretion, require any such fact to be proved. If the judgment is pronounced on the basis of the facts contained in the plaint, decree is to be drawn in accordance with Order VIII, Rule 5(4). Similarly, if a party from whom written statement is required under Order VIII, Rule 10, fails to present the same within the time permitted or fixed by the Court, the Court is entitled to pronounce judgment against such party, or make such order in relation to the suit as it thinks fit. If the judgment is pronounced, the decree is required to be drawn up. Such decree pronounced on non filing of written statement cannot be considered to be an exparte decree as contemplated under Order IX, Rule 6. These types of decrees are passed because of failure to file written statement.

Further, in a case where Written Statement is not filed and at the time of hearing, even if the defendant is present, the Court is entitled to pronounce the judgment and pass decree. If the defendant is absent and the Written Statement as required is not filed, the Court is also entitled to pronounce judgment on the basis of the averments made in the plaint.

13. As against this, under Order IX, the Court is required to follow different procedure. Order IX, Rule 1 provides that on the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court house and suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court. This means that suit is fixed for hearing and on the date of hearing if neither parties appears then the suit may be dismissed as provided under Order IX, Rule 3. If the defendant fails to appear on the date of hearing, the Court is required to pass an order that the suit be heard exparte and to proceed further with the hearing of the suit. This requires recording of evidence and to proceed with the matter. After recording evidence ex parte, the Court can pronounce judgment on the basis of the evidence which is brought by the plaintiff. In such cases, the suit is not disposed of as provided under Order VIII, Rule 5 or Rule 10 on the basis of the averments made in the plaint.

14. Further, under Order IX, Rule 13, the defendant is entitled to file application for setting aside exparte decree on two grounds, namely (i) that the summons was not duly served and (ii) that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. This also indicates that the suit is required to be fixed for hearing and on the date of hearing the defendant is absent.

15. In this view of the matter, in our view, application under Order IX, Rule 13 is not maintainable when the Court has

> passed a decree under Order VIII, Rule 5 or Rule 10 of the C.P.C. There is no provision in Order VIII for setting aside a decree passed under Rule 5 or 10 thereof for non-filing of Written statement. The only remedy open in such cases is to file an appeal against such decree. Decree under Order VIII, Rule 5 or Rule 10 is passed because of the specific provisions under Order VIII that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, then it shall be taken to be admitted except against a person under disability, and thereafter there is a provision that the Court has discretion to pronounce judgment on the basis of the facts contained in the plaint. This scheme is totally different from the scheme of passing ex parte decree under Order IX."

9. The view of the Division Bench in the aforesaid case is, however, assailed by the learned counsel for the appellant by relying upon the judgment of the Supreme Court in the case of Prakash Chander Manchanda (supra).

10. In Prakash Chander Manchanda, the facts were that in the suit filed against Smt. Janki Manchanda when the matter was fixed for evidence of the defendant Prakash Chander Manchanda, The defendant's witness was not present. The plaintiff's evidence was already over. Thereafter, it appears that the matter was adjourned from time to time and then transferred to some other court. In the transferee court also the matter was

adjourned. On 30.10.1985 when the case was posted before the learned trial Judge, none of the witnesses for the defendant was present and the court accordingly, closed the evidence of the defendant and placed the matter for arguments. The next date fixed was 1.11.1985. On this date also, nobody appeared for the defendant and the matter was adjourned to 8.11.1985. On 8.11.1985, the arguments of the plaintiff's counsel were heard and as none was present for the defendant, the case was fixed for judgment on 11.11.1985. The pronouncement of judgment was postponed to 21.11.1985 and on that date, it was pronounced. The defendant made an application for setting aside the exparte decree under Order IX Rule 13 which came to be dismissed by the trial Court. The first appeal was dismissed by the High Court of Delhi summarily and then the matter went to the Supreme Court. The Supreme Court considered the provisions contained in Order XVII Rule 2 and 3 and explained the legal position thus-

> It is clear that in cases where a party is absent only course is as mentioned in O.17(3)(b) to proceed under R.2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under R.2 similarly the language of R.2 as now stands also clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose

of the suit in one of the modes directed under O.9. The explanation to R.2 gives a discretion to the Court to proceed under R.3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined up to that date the Court has no option but to proceed to dispose of the matter in accordance with O.17 R.2 in any one of the modes prescribed under O.9, Civil P.C. It is therefore clear that after this amendment in O.17 Rr.2 and 3, Civil P.C. there remains no doubt and therefore there is no possibility of any controversy. In this view of the matter it is clear that when in the present case on 30.10.1985 when the case was called nobody was present for the defendant. It is also clear that till that date the plaintiff's evidence has been recorded but no evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned. It is therefore clear that up to the date i.e. 30.10.1985 when the trial court closed the case of defendant there was no evidence on record on behalf of the defendant. In this view of the matter therefore the explanation to O.17 R.2 was not applicable at all. Apparently when the defendant was absent O.17 R.2 only permitted the Court to proceed to dispose of the matter in any one of the modes provided under O.9.

7. It is also clear that O.17 R.3 as it stands was not applicable to the facts of this case as admittedly on the date when the evidence of defendant was closed nobody appeared for the defendant. Ink this view of the matter it could not be disputed that the Court when proceeded to dispose of the suit on merits had committed an error."

11. The judgment of the Supreme Court in Prakash Chander is not an authority for the proposition

that where a party is required to file written statement but has failed to do so the trial court must proceed under Order XVII Rule 2 and not under Order VIII Rule 10. For the purposes of Order VIII Rule 10 CPC what is material is non-filing of the written statement by the party who is required to file such written statement irrespective of whether he is present or not. We find ourselves in agreement with the view of the Division Bench of this court in the case of Dhanwantrai R. Joshi that in a case where written statement was not filed and at the time of hearing irrespective of whether the defendant is present or not, the court is entitled to pronounce the judgment and pass the decree. If the defendant is absent and the written statement as required is not filed, the court is entitled to pronounce the judgment on the basis of the averments made in the plaint as well. Such decree cannot be a decree under Order IX Rule 13 but is a decree under Order VIII Rule 10 of the CPC. In this view of the matter, the application under Order IX Rule 13 for setting aside the decree passed under Order VIII Rule 10 was not maintainable. The learned motion Judge kept the aforesaid legal position in mind and dismissed the notice of motion as not maintainable.

12. We find no error in the order. Appeal is dismissed.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)